CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 175

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

E. C. PETERSON

No. 176

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

L. T. PETERSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

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No. 175

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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A Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the March Term, 1935, of said court, before the Honorable John B. Sanborn, the Honorable Joseph W. Woodrough, and the Honorable Wilbur F. Booth, Circuit Judges.

[Caption omitted.]

1 Before United States Board of Tax Appeals

Docket No. 60837

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order extending time to file record to May 15, 1934

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be, and it is hereby, extended to May 15, 1934.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C., April 5, 1934.

Now, June 4, 1934, the foregoing order enlarging time certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed:] Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before U. S. Board of Tax Appeals

No. 60837

Order further extending time to file record to July 2, 1934

For cause appearing of record, it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be, and it is hereby, extended to July 2, 1934.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C., May 15, 1934.

2 Now, June 4, 1934, the foregoing order enlarging time certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed:] Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before United States Board of Tax Appeals

Docket No. 60839

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order extending time to file record to May 15, 1934

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be, and it is hereby extended to May 15, 1934.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C., April 5, 1934.

Now, June 4, 1934, the foregoing order enlarging time certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed:] Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before U. S. Board of Tax Appeals

No. 60839

Order further extending time to file record to July 2, 1934

For cause appearing of record, it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above-entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be, and it is hereby, extended to July 2, 1934.

(Signed) EUGENE BLACK,
Member.

Dated Washington, D. C., May 15, 1934.

3 Now, June 4, 1934, the foregoing order certified from the record as a true copy.

[SEAL] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed:] Filed in the United States Circuit Court of Appeals for the Eighth Circuit on June 18, 1934, E. E. Koch, Clerk.

Before U. S. Board of Tax Appeals

Docket entries in case no. 60837

[Title omitted.]

Appearances: For taxpayer—J. Marvin Hayes, Esq. (withdrawn), W. C. Magathan, Esq., C. J. McGuire, Esq. (withdrawn), Oscar Mitchell, Esq.; for Comm'r.—E. L. Corbin, Esq., Prew Savoy, Esq.

1931
Dec. 12—Petition received and filed. Taxpayer notified. (Fee paid.)
" 14—Copy of petition served on General Counsel.
1932
Feb. 6—Answer filed by General Counsel.
" 13—Copy of answer served on taxpayer, assigned to General Counsel.
Mar. 29—Motion to strike answer filed by taxpayer.
Apr. 5—Hearing set April 20, 1932 on motion.
" 5—Copy of notice of hearing date and motion served on General Counsel.
" 20—Hearing had before Mr. Van Fossan, Div. 9. Petitioner's motion to strike, granted. Exception to respondent.
" 20—Order granting motion and that proceeding remain in General Calendar entered. Exception of respondent noted.
Aug. 13—Hearing set 10/12/32.
Sept. 19—Motion to consolidate with dockets 60838 and 39 for hearing 10/12/32 filed by taxpayer. 9/21/32 granted.

4 Oct. 12—Hearing had before J. M. Sternhagen, Div. 10. Submitted on the merits. Stipulation of facts and exhibits filed. Briefs due Nov. 22, 1932. Replies Dec. 1, 1932. Exchange by counsel.
" 19—Transcript of hearing of 10/12/32 filed.
Nov. 22—Brief filed by taxpayer. 11/25/32 copy served. Twenty printed copies received 12/5/32.
" 22—Brief filed by General Counsel.
" 30—Motion for extension of 10 days to file reply brief filed by taxpayer. Granted.
Dec. 12—Reply brief filed by taxpayer. Twenty printed copies received 12/19/32.

1933
May 27—Supplemental brief filed by taxpayer.
June 2—Memorandum filed by General Counsel.
" 30—Opinion rendered, J. M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.
Nov. 16—Notice of settlement filed by General Counsel.
" 20—Hearing set Dec. 13, 1933, under Rule 50.
Dec. 11—Consent to settlement filed by taxpayer.
" 18—Judgment entered, Div. 10.
1934
Feb. 5—Notice of withdrawal of J. Marvin Haynes and C. J. McGuire and appearance of Oscar Mitchell as counsel for taxpayer filed.
" 5—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by taxpayer.
Feb. 5—Proof of service of petition for review filed.
Mar. 10—Praecipe with proof of service thereon filed by taxpayer.
Apr. 5—Order enlarging time to May 15, 1934, for transmission and delivery of record sur petition for review entered.
May 15—Order enlarging time to July 2, 1934, for transmission and delivery of record sur petition for review entered.

5 Before U. S. Board of Tax Appeals

Docket entries in case no. 60839.

[Title omitted.]
Appearances: For taxpayer.—J. M. Haynes (withdrawn), W. C. Magathan, Esq., C. J. McGuire (withdrawn), Oscar Mitchell, Esq.; for Comm'r.—E. L. Corbin, Esq., Prew Savoy, Esq.
1931
Dec. 12—Petition received and filed. Taxpayer notified. (Fee paid.)
" 14—Copy of petition served on General Counsel.
1932
Feb. 6—Answer filed by General Counsel.
" 13—Copy of answer served on taxpayer, assigned to General Calendar.
Mar. 29—Motion to strike answer filed by taxpayer.
Apr. 5—Hearing set April 20, 1932 on motion.
" 5—Copy of notice of hearing date and motion served on General Counsel.
" 20—Hearing had before Mr. Van Fossan, Div. 9 on petitioner's motion to strike answer—granted. Exception to respondent.
" 20—Order granting motion to strike and proceeding to remain on General Calendar entered.
Aug. 13—Hearing set Oct. 12, 1932.
Sep. 19—Motion to consolidate with dockets 60837 and 38 for hearing 10/12/32 filed by taxpayer 9/21/32 granted.
Oct. 12—Hearing had before J. M. Sternhagen, Div. 10. Submitted on merits. Stipulation of facts and exhibits filed. Briefs due Nov. 22, 1932. Replies due Dec. 1, 1932. Exchange by counsel.
" 19—Transcript of hearing 10/12/32 filed.

Nov. 22—Brief filed by taxpayer. 11/25/32 copy served. 20 printed copies received 12/5/32.
" 22—Brief filed by General Counsel.
6 " 30—Motion for extension of 10 days to file reply brief filed by taxpayer. Granted.
Dec. 12—Reply brief filed by taxpayer. 20 copies received 12/19/32.
1933
May 27—Supplemental brief filed by taxpayer.
Jun. 2—Memorandum filed by General Counsel.
" 30—Opinion rendered, Mr. J. M. Sternhagen, Div. 10. Judgment will be entered under Rule 50.
Nov. 16—Notice of settlement filed by General Counsel.
" 20—Hearing set Dec. 13, 1933 under Rule 50.
Dec. 11—Consent to settlement filed by taxpayer.
" 18—Judgment entered, Div. 10.
1934
Feb. 5—Notice of withdrawal of J. Marvin Haynes and C. J. McGuire and appearance of Oscar Mitchell as counsel for tax payer filed.
" 5—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by taxpayer.
" 5—Proof of service of petition for review filed.
Mar. 10—Praecipe with proof of service thereon filed by taxpayer.
Apr. 5—Order enlarging time to May 15, 1934 for transmission and delivery of record sur petition for review entered.
May 15—Order enlarging time to July 2, 1934 for transmission and delivery of recordjsur petition for review entered.

United States Board of Tax Appeals

Petition of E. C. Peterson for appeal in case no. 60837

Filed December 12, 1931

[Title omitted.]

7 The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D-1; GFG-60D) dated October 20, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 2215 East Second Street, Duluth, Minnesota.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 20, 1931.

3. The taxes in controversy are income taxes for the year 1928 and in the amount of $15,982.31.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The respondent has overstated by $97,596.36 the amount of dividends received from Minnesota Tea Company out of its earnings or profits.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the year 1928, the petitioner owned 702 shares of the capital stock of Minnesota Tea Company, out of a total issued capital stock of 1,517 shares. These shares were acquired more than two years prior to August 23, 1928.

(b) On August 23, 1928, in pursuance of a plan of reorganization, Minnesota Tea Company transferred all of its assets to Grand Union Company and received in exchange therefor 18,000 shares of common stock of said Grand Union Company plus $426,842.52 in cash.

(c) The basis to Minnesota Tea Company of the assets transferred to Grand Union Company was $254,646.62.

(d) The contract under which the stock of Grand Union Company was received by Minnesota Tea Company provided that only one-fifth of the stock received could be sold in each year for a period of five years. None of this stock has been sold.

(e) The stock of Grand Union Company received by Minnesota Tea Company had no fair market value when received.

(f) In pursance of the plan of reorganization, Minnesota
8 Tea Company immediately upon the receipt of the said cash in the amount of $426,842.52 distributed it to its stockholders subject to liabilities in the amount of $106,471.73 which the stockholders assumed in proportion to their stockholdings. The amount received by the petitioner less of the amount of liabilities assumed and paid by the petitioner was $148,235.56.

(g) At the time of the said cash distribution the undistributed earnings or profits of Minnesota Tea Company amounted to $109,442.83.

(h) The respondent has determined that the entire said distribution received amounting to $148,235.56 was made out of earnings or profits of Minnesota Tea Company and has accordingly taxed the entire distribution as a dividend.

(i) At the time of the said cash distribution the basis of the Minnesota Tea Company stock owned by the petitioner was $59,376.78.

6. Wherefore, the petitioner prays that this Board may hear the proceeding and (a) determine that of the distribution of $148,235.56 received from Minnesota Tea Company only $50,639.20 is taxable as a dividend and that the balance of the distribution should be applied against the basis of the stock, (b) afford such further relief as the nature of the case may require and to the Board may seem equitable and proper.

J. MARVIN HAYNES,
Counsel for Petitioner,
916 Investment Building, Washington, D. C.

Of counsel:
LYBRAND, ROSS BROS. & MONTGOMERY.
C. J. MCGUIRE.
W. C. MAGATHAN.

Dated November 16, 1931.

[*Duly sworn to by E. C. Peterson, jurat omitted in printing.*]

9 EXHIBIT "A" TO PETITION

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, October 20, 1931.

Mr. E. C. PETERSON,
2215 East Second Street, Duluth, Minnesota.

SIR: You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $15,982.31, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By (Sgd) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

10 STATEMENT

IT:AR:D-1
GFG-60D

In re: Mr. E. C. PETERSON, *2215 East Second Street, Duluth, Minnesota.*

TAX LIABILITY

Year	Tax liability	Tax assessed	Deficiency
1928	$26,305.00	$10,322.78	$15,982.31

The report of the internal revenue agent in charge at St. Paul, Minnesota, covering an examination of your income tax liability for the year 1928 has as the result of the conference held in your behalf in this office January 23, 1931, been revised to show the above deficiency.

Your tax liability is determined as follows:

Net income reported on return		$58,395.84
Add:		
1. Dividends		148,235.56
Total		$206,631.40
Deduct:		
2. Other income reduced		42,766.86
Net income as adjusted		$163,864.54
Capital net gain reported on return		$47,206.55
Deduct:		
3. Gain from stock redeemed reduced		34,329.73
Capital net gain as adjusted		$12,876.82

COMPUTATION OF TAX

Total net income adjusted		$176,741.36
Less:		
Capital net gain included		12,876.82
Ordinary net income adjusted		$163,864.54
Brought forward		$163,864.54
Less:		
Dividends	$150,066.56	
Personal exemption and credit for dependents	4,700.00	
		154,766.56
Net income subject to normal tax		9,097.98
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $1,097.98		54.90
Surtax on $163,864.54		24,432.91
Tax at 12½% on $12,876.82		1,609.60
Total		$26,277.41
Less:		
Earned income credit		72.35
Total tax liability		$26,205.06
Tax previously assessed		10,222.75
Deficiency		$15,982.31

EXPLANATION OF CHANGES

1. This item was fully explained by the revenue agent. You are advised that careful consideration has been given the information furnished in your protest and at the conferences held in your behalf relative to the taxability of your proportionate share of the cash received by you from the Minnesota Tea Company. In this connection you are advised that in the absence of any authorities contrary to the position heretofore taken this office is of the opinion that the inhibition against recognition of gain contained in section 112 (d) (1) of the Revenue Act of 1928 should be limited in its application to cases where the income tax liability of the transferor corporation is involved and that for the purpose of determining the true nature of the distribution by the transferor corporation to its stockholders, the actual gain realized by said corporation should be reflected on its books.

2. This item was fully explained by the revenue agent.

3. This office concedes the March 1, 1913, value of the good will of the Minnesota Tea Company to be $20,000.00 and the total value of the stock to be $144,675.00. In the absence of market values of the stocks of the Minnesota Tea Company and Peterson Investment Company the following basic cost of each as submitted in your protest has been accepted:

	Amount	Percent
Minnesota Tea Company:		
Assets	$1,019,738.20	
Liabilities	106,471.73	
Net assets	$913,266.47	88.7
Peterson Investment Company: Net assets	116,313.35	11.3
	$1,029,579.82	100.0

12 The allocation of the basis is:

	Percent	Amount
Minnesota Tea Company	88.7	$128,326.73
Peterson Investment Company	11.3	16,348.27
	100.0	$144,675.00

Cost per share Minnesota Tea Company stock (1,517 shares costing $128,326.73) is $150.51

Cost per share Peterson Investment Company stock (1,137.75 shares costing $16,348.27) is 14.37

Stockholdings in Minnesota Tea Company were as follows:

E. C. Peterson	702 shares	46.27%
L. T. Peterson	702 shares	46.27%
A. F. Peterson	113 shares	7.46%
	1,517 shares	100.00

In Peterson Investment Company:

E. C. Peterson	526.5 shares
L. T. Peterson	526.5 shares
A. F. Peterson	84.75 shares
	1,137.75

Gain realized on partial liquidation Peterson Investment Company.

226 shares turned in at par value of $22,600.00 cash value of liability	Total	E. C. Peterson 46.27%	L. T. Peterson 46.27%	A. F. Peterson 7.46%
Cost of stock at $14.37 per share	$22,600.00 4,670.78	$14,027.73 2,160.95	$14,027.73 2,160.95	$2,434.50 348.90
Taxable gain	$27,829.78	$12,676.82	$12,676.82	$2,076.10

Inasmuch as you reported a profit of $47,206.55 from this transaction instead of $12,867.82 the difference is $34,329.73.

Consent which will expire December 31, 1931, except as extended by the provisions of section 277 of the Revenue Act of 1928 is on file for the year 1928.

A copy of this letter, together with a copy of the statement and schedules, has been mailed to your representatives, Mr. C. J. McGuire and Mr. W. H. Davidson, Investment Building, Washington, D. C., in accordance with the authority conferred upon it in the power of attorney executed by you and on file with the Bureau.

13 Before United States Board of Tax Appeals

Answer of Commissioner of Internal Revenue in case no. 60837

Filed February 6, 1932

[Title omitted.]

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits and denies as follows, to wit:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3.

4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5. (a) Admits that the petitioner owned 702 shares of the common stock of the Minnesota Tea Company during the year 1928, as alleged in paragraph 5 (a) of the petition, but denies all other allegations contained in said paragraph.

(b) Denies the allegations contained in paragraph 5 (b) of the petition.

(c), (d), and (e). Denies the allegations contained in subparagraphs (c), (d), and (e) of paragraph 5 of the petition.

(f) Admits that the petitioner received $148,235.56, as alleged in subparagraph (f) of paragraph 5 of the petition, but denies all other allegations contained in said paragraph.

(g) Denies the allegations contained in paragraph 5 (b) of the petition.

(h) Denies the allegations contained in paragraph 5 (h) of the petition.

(i) Denies the allegations contained in paragraph 5 (i) of the petition.

Denies generally and specifically each and every allegation set forth in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that that Board redetermine the amount of the deficiency involved in this proceeding to be equal
14 to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner.

Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
ALLIN H. PIERCE,
IRVING M. TULLAR,
Special Attorneys, Bureau of Internal Revenue.

Before United States Board of Tax Appeals, Washington

Order striking certain words from answer in case no. 60837

[Title omitted.]

This proceeding having been called from the Day Calendar of April 20, 1932, on motion of counsel for the petitioner that the following words be stricken from the final paragraph of the answer in the above-entitled proceeding:

"* * * plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination."

and due consideration having been given said motion, it hereby is

Ordered that the motion be and hereby is granted and that the proceeding remain on the General Calendar for hearing in due course.

(Signed) ERNEST H. VAN FOSSAN,
Member.

15 Counsel for the respondent excepts to the foregoing, and at his instance, exception is noted.

(Signed) ERNEST H. VAN FOSSAN,
Member.

Dated, April 20, 1932.

A true copy.
Teste:

B. D. GAMBLE,
[SEAL] *Clerk of U. S. Board of Tax Appeals.*

Before United States Board of Tax Appeals

Petition of L. T. Peterson for appeal in case no. 60839

Filed December 12, 1931

[Title omitted.]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal

Revenue in his notice of deficiency (IT:AR:D–1; GFG–60D) dated October 20, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 2505 East Second Street, Duluth, Minnesota.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 20, 1931.

3. The taxes in controversy are income taxes for the year 1928 and in the amount of $15,974.76.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The respondent has overstated by $97,596.36 the amount of dividends received from Minnesota Tea Company out of its earnings or profits.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the year 1928 the petitioner owned 702 shares
16 of the capital stock of Minnesota Tea Company, out of a total issued capital stock of 1,517 shares. These shares were acquired more than two years prior to August 23, 1928.

(b) On August 23, 1928, in pursuance of a plan of reorganization, Minnesota Tea Company transferred all of its assets to Grand Union Company and received in exchange therefor 18,000 shares of common stock of said Grand Union Company plus $426,842.52 in cash.

(c) The basis to Minnesota Tea Company of the assets transferred to Grand Union Company was $254,646.62.

(d) The contract under which the stock of Grand Union Company was received by Minnesota Tea Company provided that only one-fifth of the stock received could be sold in each year for a period of five years. None of this stock has been sold.

(e) The stock of Grand Union Company received by Minnesota Tea Company had no fair market value when received.

(f) In pursuance of the plan of reorganization, Minnesota Tea Company, immediately upon the receipt of the said cash in the amount of $426,842.52, distributed it to its stockholders, subject to liabilities in the amount of $106,471.73, which the stockholders assumed in proportion to their stock holdings. The amount received by the petitioner, less the amount of liabilities assumed and paid by the petitioner, was $148,235.56.

(g) At the time of the said cash distribution the undistributed earnings or profits of Minnesota Tea Company amounted to $109,442.83.

(h) The respondent has determined that the entire said distribution received, amounting to $148,235.56, was made out of earnings or profits of Minnesota Tea Company and has accordingly taxed the entire distribution as a dividend.

(i) At the time of the said cash distribution the basis of the Minnesota Tea Company stock owned by the petitioner was $59,376.78.

6. Wherefore the petitioner prays that this Board may hear the proceeding and (a) determine that of the distribution of $148,235.56

received from Minnesota Tea Company only $50,639.20 is taxable as a dividend and that the balance of the distribution should be applied against the basis of the stock, (b) afford such further relief as
17 the nature of the case may require and to the Board may seem equitable and proper.

J. MARVIN HAYNES,
Counsel for Petitioner,
916 Investment Building, Washington, D. C.

Of counsel:
LYBRAND, ROSS BROS. & MONTGOMERY.
C. J. MCGUIRE.
W. C. MAGATHAN.

Dated November 16, 1931

[*Duly sworn to by L. T. Peterson jurat omitted in printing.*]

EXHIBIT "A" TO PETITION

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, October 20, 1931.

MR. L. T. PETERSON,
2505 East Second Street, Duluth, Minnesota.

SIR: You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $15,974.76, as shown in the statement attached.

18 In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By J. C. Wilmer (Signed.)
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

STATEMENT

IT:AR:D-1
GFG-60D

In re: Mr. L. T. PETERSON,
2505 East Second Street, Duluth, Minnesota.

TAX LIABILITY

Year	Tax liability	Tax assessed	Deficiency
1928	$26,181.49	$10,206.73	$15,974.76

The report of the internal revenue agent in charge at St. Paul, Minnesota, covering an examination of your income tax liability for the year 1928 has as the result of the conference held in your behalf in this office January 23, 1931, been advised to show the above deficiency.

19 Your tax liability is determined as follows:

Net income reported on return		$158,244.49
Add:		
1. Dividends		148,235.56
Total		206,480.05
Deduct:		
2. Other income reduced		42,766.85
Net income as adjusted		$163,713.20
Capital net gain reported on return		$47,206.55
Deduct:		
3. Gain from stock redeemed reduced		34,329.72
Capital net gain as adjusted		$12,876.83

COMPUTATION OF TAX

Total net income adjusted		$176,590.03
Less:		
Capital net gain included		12,876.83
Ordinary net income adjusted		$163,713.20
Less:		
Dividends	$150,136.56	
Personal exemption and credit for dependents	4,300.00	
		154,436.56
Net income subject to normal tax		39,276.64
Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $1,276.64		63.83
Surtax on $163,713.20		24,402.64
Tax at 12½% on $12,876.83		1,609.60
Total		26,256.07
Less:		
Earned income credit		74.58
Tax liability		26,181.49
Tax previously assessed		10,206.73
Deficiency of tax		$15,974.76

EXPLANATION OF CHANGES

1. This item was fully explained by the revenue agent. You are advised that careful consideration has been given the information furnished in your protest and at the conferences held in your behalf relative to the taxability of your proportionate share of the cash received by you from the Minnesota Tea Company. In this connection you are advised that in the absence of any authorities contrary to the position heretofore taken this office is of the opinion that the inhibition against recognition of gain contained in section 112 (d) (1) of the Revenue Act of 1928 should be limited in its application to cases where the income tax liability of the transferor corporation is involved and that for the purpose of determining the true nature of the distribution by the transferor corporation to its stockholders, the actual gain realized by said corporation should be reflected on its books.

2. This item was fully explained by the revenue agent.

3. This office concedes the March 1, 1913, value of the good will of the Minnesota Tea Company to be $20,000.00 and the total value of the stock to be $144,675.00. In the absence of market values of the stock of the Minnesota Tea Company and Peterson Investment Company the following basic cost of each as submitted in your protest has been accepted.

	Amount	Percent
Minnesota Tea Company:		
Assets	$1,019,739.20	
Liabilities	106,471.73	
Net assets	$913,266.47	88.7
Peterson Investment Company: Net assets	116,313.35	11.3
	$1,029,579.82	100.0

The allocation of the basis is:

	Percent	Amount
Minnesota Tea Company	88.7	$128,326.73
Peterson Investment Company	11.3	16,348.27
	100.0	$144,675.00

Cost per share Minnesota Tea Company stock (1,517 shares costing $128,326.73) is $150.51

Cost per share Peterson Investment Company stock (1,137.75 shares costing $16,348.27) is 14.37

Stockholdings in Minnesota Tea Company were as follows:

E. C. Peterson	702 shares	46.27%
L. T. Peterson	702 shares	46.27%
A. F. Peterson	113 shares	7.46%
	1,517 shares	100.00%

21 In Peterson Investment Company:

E. C. Peterson	526.5 shares
L. T. Peterson	526.5 shares
A. F. Peterson	84.75 shares
	1,137.75 shares

Gain realized on partial liquidation Peterson Investment Company.

325 shares turned in at par value of $32,500 cash value of liability	Total	E. C. Peterson 46.27%	L. T. Peterson 46.27%	A. F. Peterson 7.46%
Cost of stock at $14.37 per share	$32,500.00	$15,037.75	$15,037.75	$2,424.50
	4,670.25	2,160.93	2,160.92	348.40
Taxable gain	27,829.75	12,876.82	12,876.83	2,076.10

Inasmuch as you reported a profit of $47,206.55 from this transaction instead of $12,876.83 the difference is $34,329.72.

Consent which will expire December 31, 1931, except as extended by the provisions of section 277 of the Revenue Act of 1928 is on file for the year 1928.

A copy of this letter, together with a copy of the statement and schedules, has been mailed to your representatives, Mr. C. J. McGuire and Mr. W. H. Davidson, Investment Building, Washington, D. C., in accordance with the authority conferred upon them in the power of attorney executed by you and on file with the Bureau.

Before United States Board of Tax Appeals

[Title omitted.]

Answer of Commissioner of Internal Revenue in case no. 60839

Filed February 6, 1932

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue, and for answer to the petition of the above-named taxpayer, admits and denies as follows, to wit:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3.

22 4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.

5 (a) Admits that the petitioner owned 702 shares of the common stock of the Minnesota Tea Company during the year 1928, as alleged in paragraph 5 (a) of the petition, but denies all other allegations contained in said paragraph.

(b) Denies the allegations contained in paragraph 5 (b) of the petition.

(c), (d), (e). Denies the allegations contained in subparagraphs (c), (d), and (e) of paragraph 5 of the petition.

(f) Admits that the petitioner received $148,235.56, as alleged in subparagraph (f) of paragraph 5 of the petition but denies all other allegations contained in said paragraph.

(g) Denies the allegations contained in paragraph 5 (g) of the petition.

(h) Denies the allegations contained in paragraph 5 (h) of the petition.

(i) Denies the allegations contained in paragraph 5 (i) of the petition.

Denies generally and specifically each and every allegation set forth in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
ALLIN H. PIERCE,
IRVING M. TULLAR,
Special Attorneys, Bureau of Internal Revenue.

23 Before United States Board of Tax Appeals, Washington

[Title omitted.]

Order striking certain words from answer in case no. 60839

This proceeding having been called from the Day Calendar of April 20, 1932, on motion of counsel for the petitioner that the following words be stricken from the final paragraph of the answer in the above-entitled proceeding:

"* * * plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination."

and due consideration having been given said motion, it hereby is

Ordered that the motion be and hereby is granted and that the proceeding remain on the General Calendar for hearing in due course.

(Signed) ERNEST H. VAN FOSSAN,
Member.

Counsel for the respondent excepts to the foregoing, and at his instance, exception noted.

(Signed) ERNEST H. VAN FOSSAN,
Member.

Dated, April 20, 1932.

A true copy.
Teste:
[SEAL]

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Agreed statement of facts in cases nos. 60837, 60838, and 60839

Filed Oct. 12, 1932

[Title omitted.]

24 It is hereby stipulated and agreed by and between E. C. Peterson, A. F. Peterson, and L. T. Peterson, petitioners, and the Commissioner of Internal Revenue, respondent, by their respective attorneys that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either or any party to these proceedings to introduce other and further evidence not at variance with the facts herein stipulated.

1. The petitioners herein are individuals residing at Duluth, Minnesota.

2. During the taxable year 1928 the petitioners owned the entire issued capital stock, 1,517 shares, of the Minnesota Tea Company, a corporation, and their respective shares were as follows:

E. C. Peterson	702 shares
A. F. Peterson	113 Do.
L. T. Peterson	702 Do.

These shares were acquired by the respective petitioners more than two years prior to August 23, 1928.

3. On August 23, 1928, the said Minnesota Tea Company transferred all of its assets to Grand Union Company, another corporation, and received in exchange therefor 18,000 shares of the common capital stock (represented by voting trust certificates) of said Grand Union Company, plus the sum of $426,842.52 in cash. No liabilities of Minnesota Tea Company were assumed by Grand Union Company.

4. The transfer effected as described in paragraph 3, immediately preceding, was accomplished in accordance with the following plan:

(a) On August 22, 1928, the stockholders of Minnesota Tea Company adopted a resolution, a copy of which is attached hereto, made a part hereof, and marked "Exhibit A."

(b) A copy of the option dated July 2, 1928, referred to in the aforedescribed resolution is attached hereto, made a part hereof, and marked "Exhibit B."

(c) On August 22, 1928, the Directors of Minnesota Tea Company adopted a resolution, a copy of which is attached hereto, made a part hereof, and marked "Exhibit C."

(d) On July 6, 1928, the option of July 2, 1928, was accepted by O. B. Westphal, Esq., who in all of the transactions with Minnesota Tea Company was acting as agent for Grand Union Company.

25 (e) On July 24, 1928, an agreement supplemental to the option of July 2, 1928, was accomplished, a copy of which is attached hereto, made a part hereof, and marked "Exhibit D."

(f) Also attached hereto and made a part hereof is a copy of the minutes of a stockholders' meeting held on August 23, 1928, marked "Exhibit E."

5. The basis to the Minnesota Tea Company of the assets so transferred to Grand Union Company, for computing gain or loss, was $254,646.62.

6. Minnesota Tea Company, immediately upon the receipt of the said cash in the amount of $426,842.52, paid this cash to its said stockholders, in proportion to their stockholdings, and at the time of said payment the said stockholders assumed, in proportion to their stockholdings, the liabilities of the said Minnesota Tea Company amounting to $106,471.73, and thereafter the stockholders duly discharged and paid said liabilities so assumed.

7. The said payment of the sum of $426,842.52 to the stockholders and their said assumption of the liabilities of the company were made pursuant to the following resolution adopted at a special meeting of the stockholders of the Minnesota Tea Company held on August 22, 1928:

"Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock or securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders, whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of the Minnesota Tea Company whether due and payable or not and whether certain or contingent."

26 8. The amounts of said payments to the respective stockholders, petitioners herein, and the amounts of the liabilities respectively assumed were as follows:

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,830.66	7,930.99	23,899.67
L. T. Peterson	197,505.93	49,270.37	148,235.56
	$426,842.52	$106,471.73	$320,370.79

9. At August 23, 1928, immediately prior to the said receipt by Minnesota Tea Company of said cash and stock of Grand Union Company, the undistributed earnings and profits of Minnesota Tea Company amounted to the sum of $109,442.83.

10. The said 18,000 shares of stock of Grand Union Company was received by Minnesota Tea Company under a contract dated July 2, 1926 (Exhibit B, attached). None of this stock has been sold.

11. Voting trust certificates for the common stock of said Grand Union Company have been listed on the New York Stock Exchange since June 2, 1928. During the week beginning August 19th and ending August 24, 1928, trust certificates for 42,700 shares of said common stock were traded in on said exchange. The sales prices on said exchange of such certificates and the number of such shares issued for the period from June 2, 1928, to August 31, 1932, were as follows:

Period	Common shares outstanding	Price range	
		High	Low
June 2 to August 18, 1928	220,000	30½	28¾
August 19 to 24, 1928	239,726	30¼	29¼
August 25 to December 31, 1928	239,726	41⅛	30⅛
1929	261,710	32⅜	9¼
1930	270,348	20¾	10
1931	270,348	18⅛	7
1932 to August 30th	277,667	9¾	3¼

12. The respective bases of the Minnesota Tea Company stock owned by the petitioners for the purpose of determining gain or loss on the sale or other disposition thereof were as follows:

E. C. Peterson	$59,376.78
A. F. Peterson	9,573.17
L. T. Peterson	59,376.78
	$128,326.73

27 13. If, of the net amount of $320,370.79 received by the stockholders, only $109,442.83 is considered to have been paid out of earnings or profits, the amount taxable to each petitioner as dividends and the amount taxable as capital gain is as follows:

Petitioner	Net receipts	Taxable as dividends	Return of capital	Basis of stock	Taxable as capital gain
E. C. Peterson	$149,256.56	$50,445.27	$97,360.29	$89,276.73	$28,313.51
A. F. Peterson	23,899.67	8,152.29	15,747.38	8,573.17	6,174.21
L. T. Peterson	148,223.56	50,445.27	97,360.29	89,276.73	28,313.51
	$320,370.79	$109,442.83	$210,927.96	$186,226.73	$62,801.23

14. The respondent determined that the entire amount of the net receipts by the petitioners in the aggregate amount of $320,370.79, as set forth in paragraphs 7 and 12 above, was a distribution out of earnings or profits and the deficiencies asserted are computed on the basis of taxing the entire amount of $320,370.79 as a dividend. If the Board so holds, the computations of the respondent are correct.

C. J. McGUIRE,
Attorney for Petitioner.
C. M. CHAREST,
General Counsel, Attorney for Respondent.

EXHIBIT "A"

Minutes of the special meeting of the stockholders of Minnesota Tea Company, held at its office in the City of Duluth, Minnesota, on the 22nd day of August, 1928, at ten o'clock in the forenoon.

Pursuant to the call of the president, a special meeting of the stockholders of the company was held at its offices, in the City of Duluth, Minn., on August 22nd, 1928, at ten o'clock in the forenoon, after all the stockholders in writing had mutually agreed and consented to the holding of such meeting and waived notice of the time and place and the purposes of such meeting required by the by-laws of the company and the statutes of the state.

All the stockholders were present during the meeting and participated therein and in the proceedings.

E. C. Peterson presided and A. F. Peterson acted as the secretary thereof.

28 The president reported to the meeting that it was advisable that all the assets of the company should be sold under the option dated July 2, 1928, given by the president and secretary to O. B. Westphal as modified by an agreement dated July 24th, 1928, upon the terms therein set out, except that, as the company has conveyed all its real estate, the lease specified in such option shall be made by Peterson Investment Company, the owner of the property, and further that it was advisable to distribute to the company's stockholders all the moneys received on such sale, whenever received by

the company, ratably according to their stockholdings, and that the stockholders should assume the corporate debts to enable it to hold all the corporate stock or securities received.

After a full discussion and consideration of the matters relating to such reorganization and in order to effect such reorganization by the sale of the company's assets for corporate securities or stock and moneys and the distribution of the moneys to the stockholders and the retention by the company of all the said stock and securities, a written resolution was read and its adoption moved, seconded and carried by the unanimous vote of all the stockholders. Such resolution was of words and tenor as follows:

"Resolved that the written option, dated July 2nd, 1928, and made by the President and Secretary of the company, in behalf of Minnesota Tea Company, to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying the said option, be and hereby are ratified, confirmed and approved, and that the actions of the President and Secretary in giving and executing such option and in signing and executing such agreement modifying said option be and are hereby in all things ratified, confirmed, and approved.

"Resolved further that the assets of Minnesota Tea Company described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal, or his nominee, in pursuance of and under such option and agreement modifying the same and on the terms therein stipulated and thereby agreed and for the consideration therein and thereby stipulated, or upon such other terms as may be deemed advisable by the board of directors, and that any other assets, if any there be, owned by, or in the disposition of, Minnesota Tea Company be
29 sold or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

"Resolved further that the Board of Directors be and hereby are authorized and directed to effect and make such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the considerations stipulated in said option and agreement modifying the same, or upon such other terms as the Board of Directors, or the president, by the board thereto authorized, may deem advisable.

"Resolved further that the Board of Directors, in order to effect such sale of said assets of this company, and to carry out the terms of said option as modified and of the terms of any agreement, hereby authorized, relative thereto, be and are hereby authorized and directed to cause to be executed and delivered to the purchaser of said assets, in behalf of and by Minnesota Tea Company, any bill of sale, assignments, agreements, or other instruments by the president and the secretary and to cause Peterson Investment Company to execute the

lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

"Resolved further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent.

"Resolved further that Minnesota Tea Company shall continue to own and hold the said corporate stock and securities without the sale or distribution thereof."

It was then moved, seconded, and carried by the vote of the stockholders that the written consent to the holding of the special meeting and the waiver of notice of the holding thereof and the written resolution adopted at the meeting be copied into the minutes of the meeting and that said written consent and waiver and said written resolution adopted be filed with the files and records of the company.

The said written consent and waiver were of the following words and tenor:

We, the undersigned, being all the stockholders of Minnesota Tea Company, do hereby mutually consent to the holding of a special meeting of the stockholders of Minnesota Tea Company and its stockholders at the office of the corporation, in the City of Duluth, Minnesota, for any purpose, or purposes, that may affect the corporation and its business, as call by the President, and we waive any and every notice, or notices, of such meeting and of the purpose thereof required by the statutes of Minnesota or the By-Laws of the corporation.

Dated August 22, 1928.

(Signed) E. C. PETERSON.
L. T. PETERSON.
A. F. PETERSON.

The meeting of the stockholders adjourned on motion made and carried.

(Signed) A. F. PETERSON,
Secretary.

Attest:

(Signed) E. C. PETERSON,
President.

The undersigned, being all the stockholders of Minnesota Tea Company do hereby certify that the foregoing minutes are true and correct.

(Signed) E. C. PETERSON.
L. T. PETERSON.
A. F. PETERSON.

EXHIBIT "B"

DULUTH, MINN., *July 2, 1928.*

O. B. WESTPHAL, Esq.,
Chicago, Ill.

DEAR SIR: In consideration of $100, the receipt of which is hereby acknowledged, the undersigned corporation, organized and
31 existing under the laws of the State of Minnesota, having its principal office at No. 2023 West Superior Street, Duluth, Minnesota, grants to you an irrevocable option as follows:

First: This option shall extend for thirty days from date.

Second: The option may be exercised by notice in writing mailed or delivered to the undersigned by you within the period of the option.

Third: If the option is exercised within the time and in the manner hereinbefore provided, the undersigned shall thereupon be obligated to sell and you shall be obligated to purchase or cause to be purchased, subject to all of the conditions herein contained, the assets of the undersigned hereinafter described for the consideration hereinafter set forth.

Fourth: The assets referred to in Paragraph Third hereof shall consist of all of the assets owned by the undersigned upon the delivery date, of every kind and description other than real estate, buildings, fixtures, cash, the interest of the undersigned in any insurance policies upon the lives of any and all of its officers, and any bills, notes, accounts receivable which you and the undersigned shall consider doubtful and also other than insurance on buildings and fixtures, and including the goodwill and the right to use the name of the undersigned and including all trade marks and trade names.

Fifth: The consideration provided for in Paragraph Third hereof shall consist of the following:

(a) An amount in cash equal to the total value of the following:

(1) Inventories of merchandise and supplies at cost in place of the undersigned, or wholesale market value, whichever shall be lower;

(2) Bills, notes, and accounts receivable at face value, except that with respect to balance of premium accounts, 60% of the face value shall be taken;

(3) Furnishings and equipment at depreciated book value or at reproduction cost less depreciation, whichever shall be lower;

(4) And such an additional amount in cash for goodwill as, when added to the values of the property described in paragraphs
32 (1), (2), and (3) above, shall make the total consideration provided for in this subdivision (a) the sum of $400,000.

(b) Voting Trust Certificates for Eighteen Thousand (18,000) shares of fully paid and nonassessable Common Stock without par value of The Grand Union Company, a Delaware corporation.

In the event that Lybrand, Ross Brothers & Montgomery and the auditors of the undersigned shall be unable to agree upon the values of the property described in subdivisions (1), (2), and (3) of Paragraph Fifth herein, it is agreed between us that the determination of the value of said several items in subdivisions (1), (2), and (3) aforesaid as made by said Lybrand, Ross Brothers & Montgomery shall be final and binding upon us hereunder.

Sixth: It shall be a condition of the conveyance of the assets of the undersigned as hereinbefore provided that The Grand Union Company or one of its subsidiaries shall assume all contracts of the undersigned existing at the date hereof, and disclosed in writing to you before the date hereof, together with all contracts entered into by the undersigned between the date hereof and the date of delivery in the ordinary and usual conduct of the business for the purpose of merchandise for a period of not over ninety days, and together with all other contracts entered into by the undersigned with your approval between the date hereof and the delivery date. Further, the undersigned agrees not to enter into any contracts for chattels, machinery, or equipment during the period of this option without your consent in writing.

It shall be a further condition to the conveyance of the assets of the undersigned as hereinbefore provided that the total value of the assets conveyed of the kind described in subdivisions 1, 2, and 3 of clause (a) of Paragraph Fifth hereof (determined as in said Paragraph Fifth provided) shall at the time of the conveyance be at least as great as the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927.

In the event the value of the total assets (determined as in said Paragraph Fifth provided) shall at the time of the conveyance be less than the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927, the undersigned agrees to reduce the total purchase price in an amount equal to the difference between the total value of the assets on the date of
33 delivery and the total value of the assets (determined as in said Paragraph Fifth provided) owned by the undersigned on December 31, 1927.

In the event the value of the total assets (determined as in said Paragraph Fifth provided) shall at the time of the conveyance be greater than the total value (so determined) of assets of such description owned by the undersigned on December 31, 1927, then you shall agree to increase the total purchase price in an amount equal to the difference between the total value of the assets (determined as in said paragraph Fifth provided) owned by the undersigned on December 31, 1927.

It is further agreed by the undersigned that between the date hereof and the delivery date the undersigned will conduct its business in the normal and usual course and will not dispose of any assets or collect any accounts receivable other than in the normal conduct of the business.

Seventh. The delivery date shall be determined by you, provided that such delivery date shall be not less than ten and not more than forty-five days after the date of the exercise of the option, and provided further that you shall have given the undersigned at least five days' notice in writing of the delivery date. The place of delivery shall be at such place in New York City, N. Y., as you shall designate. Delivery shall be made by instruments of conveyance in form that are, or should be, satisfactory to your counsel running to a nominee to be named by you, upon payment of 90% of the cash purchase price of $400,000, payable under subdivision (a) of Paragraph Fifth hereof, and the delivery of the Voting Trust Certificates provided for in subdivision (b) of Paragraph Fifth hereof. Payment of the balance of the purchase price payable to the undersigned hereunder, or any refund of any excess payment which shall have been made, shall be made upon final determination as to any undisclosed liabilities of the undersigned not assumed by you hereunder, together with interest at the rate of 6% from the date of the delivery, such final determination to be made not later than thirty days after the delivery date. In the event that you shall be unable to make delivery of the Voting Trust Certificates provided for in subdivision (b) of Paragraph Fifth hereof because of any delay in listing the same upon the New York Stock Exchange, the time for the delivery of such Voting Trust Certificates may at your option be extended up to but not later than forty-five days after the delivery date hereinbefore provided for; it being understood, however, that you will use your best efforts to make delivery of the Voting Trust Certificates at the earliest possible date.

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Eighth. The undersigned further agrees to execute or to cause to be executed, as lessor, a lease for the term of five years from said delivery date, in form and with such provisions as are in common use in Minnesota, at a rental of $36,000 for said term, payable in monthly installments of $600.00 on the first day of each and every month during said term in advance, covering the following-described property in St. Louis County, Minnesota, to wit: The Southerly seventy (70) feet of lot numbered 332, on West First Street, Duluth Proper Second Division, according to the recorded plat thereof in the

office of the Register of Deeds for St. Louis County, Minnesota; and the two-story brick building and basement known as 2021 and 2023 West Superior Street, City of Duluth, Minnesota, except the store room, 20 x 60, known as 2021 West Superior Street; being the premises now used by the undersigned for warehouse and garage purposes; and you agree to cause such lease to be executed by The Grand Union Company or a subsidiary as lessee.

The undersigned further agrees that said lease shall contain an agreement which shall give to the lessee, or assigns, the exclusive right and option to take a lease of said premises for the additional term of five years, beginning at the termination of the lease provided for above, on the same terms and conditions as the first lease, except as hereinafter specified, provided that notice in writing of intention to exercise the option to take such additional lease shall be served upon the undersigned, its successors or assigns, being the record owners of said real estate at said time, at least three months prior to the termination of the five-year lease first hereinabove described. In the event that the lessee shall elect to exercise the option to take said additional lease, the rental to be paid for said premises for said term shall be such sum per annum as shall equal 10% of the value of said leased premises at the beginning of said second lease term, which rental shall be payable in equal monthly installments in advance on the first day of each month during said term. In the event that the lessee and the undersigned, or our respective successors or assigns, shall be unable to agree upon the value of said leased premises at said time, then the value of said leased premises shall be determined by arbitration by three arbitrators, one to be selected by the lessee, one to be selected by the undersigned or assigns; and the third by the two arbitrators so chosen. If any arbitrator provided for hereunder shall not be appointed or selected within a reasonable time, then either party or assigns, after reasonable notice to the other, may apply to any judge of the United States District Court for Minnesota for the appointment of such arbitrator or arbitrators, whose selection shall be binding upon the parties.

Ninth: The undersigned agrees simultaneously with the conveyance of assets herein provided to change its name to a name satisfactory to you, and it further agrees in consideration of the purchase of such assets that it will not hereafter engage in the wagon-route tea and coffee business in any part of the United States.

Tenth: The undersigned agrees that it will not, for a period of one year from the delivery date, dispose of any of the voting-trust certificates to be received by it as hereinbefore provided other than to its stockholders, and it further agrees that if it disposes of any of the same to any of its stockholders it will cause them at the time of the acquisition to enter into an agreement with The Grand Union Company agreeing that for such period they will not sell or otherwise dispose of any of the same to be acquired by them.

Eleventh: The undersigned agrees upon the delivery date to cause E. C. Peterson (hereinafter called "Employed" or included among

those called "Employed") to enter into an agreement for the employment of E. C. Peterson by The Grand Union Company or a subsidiary for the period of five years at a salary of eleven thousand ($11,000) dollars per annum, payable monthly, plus 3½% of the net profits after income taxes of the branch or branches which will be under the management of the Employed E. C. Peterson, and the undersigned further agrees upon the delivery date to cause L. T. Peterson (hereinafter called the "Employed" or included among those called "Employed") to enter into a like agreement for a period of five years at a salary of eleven thousand ($11,000) dollars per annum, payable monthly, plus 3½% of the net profits after income taxes of the branch or branches which will be under the management of the Employed L. T. Peterson, and the undersigned further agrees upon the delivery date to cause A. F. Peterson (hereinafter called the "Employed" or included among those called "Employed") to enter into a like agreement for the period of five years at a salary of
36 six thousand five hundred ($6,500.00) dollars per annum, payable monthly, plus 3% of the net profits after income taxes of the branch or branches which will be under the management of the Employed A. F. Peterson, such agreements to provide that the Employed will give all his time to the service of your company or a subsidiary and will not for a period of one year after the termination of his or their, as the case may be, employment, enter into any business in any part of the United States competitive with the business of The Grand Union Company or any of its subsidiaries, and such agreement or agreements to further provide that not more than 20% of the Voting Trust Certificates which shall be distributed to any one of the Employed by the undersigned shall be sold or otherwise disposed of by the Employed during any year after the first year of his employment. You agree upon the delivery date to cause The Grand Union Company or a subsidiary to enter into the above-described employment contracts.

Twelfth: The undersigned agrees throughout the pendency of this option to afford to you and your representatives access at all reasonable times to the books, records, accounts, and properties of the undersigned for the purpose of enabling you to acquire any information relative thereto which you may desire.

Thirteenth: Your obligation hereunder shall be subject—

(a) To your having exercised the option as hereinbefore provided, and

(b) That the undersigned shall have fully performed all the obligations and conditions hereunder to be performed by it prior to the payment hereunder, and that all requisite action shall have been taken by the undersigned for the purpose of validly conveying the assets as hereinbefore required, including compliance with any applicable Bulk Sales Laws, and that the bills of sales and any other instruments or assignments tendered hereunder are sufficient to vest you or your assigns with good and marketable title to all of the assets to be conveyed, and that the lease hereinbefore provided for is valid and

binding; all in such manner and form as shall be, or should be, satisfactory to your counsel; and that

(c) The undersigned shall not have suffered a loss on account of fires, flood, accident, or other calamity which in your opinion
37 substantially affects the conduct of its business, regardless whether the amount of such loss shall have been insured.

Fourteenth: All notices under this Agreement shall be in writing, and if to the undersigned shall be sufficient in all respects if delivered in person or sent by registered mail to the undersigned at 2023 West Superior Street, Duluth, Minnesota, and if to you shall be sufficient in all respects if delivered in person or sent by registered mail to you, Evanston Hotel, Evanston, Ill.

Yours very truly,

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President*.

Attest:
A. F. PETERSON,
Secretary.

EXHIBIT "C"

Minutes of the meeting of the Board of Directors of Minnesota Tea Company held on August 22, 1928, at two o'clock in the afternoon, pursuant to call of the President.

All the members of the Board of Directors were present and E. C. Peterson presided at the meeting and A. F. Peterson acted as Secretary.

The following written resolution was read, its adoption moved, seconded, and carried and adopted by the unanimous vote of the Directors:

"Whereas at a special meeting of the stockholders of Minnesota Tea Company, held at the office of the company, on August 22, 1928, at ten o'clock in the forenoon, the stockholders adopted a resolution in writing of the following words and tenor:

"Resolved that the written option, dated July 2, 1928, and made by the President and Secretary of the company, in behalf of Minnesota Tea Company to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying said option, be, and hereby are, ratified, confirmed, and approved, and that the actions of the President and Sec. ry in
38 giving and executing such option and in signing and executing such agreement modifying said option be, and are hereby, in all things, ratified, confirmed, and approved.

"Resolved Further that the assets of Minnesota Tea Company described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal or his nominee in pursuance of and under such option and agreement modifying the same and on the terms therein stipulated and

thereby agreed and stipulated, and upon such other terms as may be deemed advisable by the Board of Directors or by the President thereto authorized by the Board of Directors, and that any other assets, if any there be, owned by, or in the disposition of, Minnesota Tea Company, be sold, or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

"Resolved Further That the Board of Directors be, and hereby are, authorized and directed to effect and make such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the considerations stipulated in said option and agreement modifying same, or upon such other terms as the Board of Directors or the president, by the Board thereto authorized, may deem advisable.

"Resolved Further that the Board of Directors, in order to effect such sale of said assets of this company and to carry out the terms of said option as modified and of the terms of any agreement hereby authorized relative thereto be, and are hereby, authorized and directed to cause to be executed and delivered to the purchaser of said assets, in behalf of Minnesota Tea Company, any bill of sale, assignments, agreements, or other instruments by the President and the Secretary and to cause Peterson Investment Company to execute the lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

"Resolved Further that all moneys received by Minnesota Tea Company on such sale of its assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in the proportion of their respective stockholdings in Minnesota Tea Company upon the assumption by the stockholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such sale thereof without being compelled to sell any part of the same, and the Board of Directors are hereby authorized and directed to
39 so distribute the said moneys as aforesaid and in behalf of the company enter into a written agreement with the stockholders, signed and executed by the company and all the stockholders, whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to hold the said corporate stock and securities without being compelled to sell any part thereof for the payment of existing debts, agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent.

"Resolved, Further, that Minnesota Tea Company shall continue to hold and own the said corporate stock and securities without the sale or distribution thereof.

"Therefore, resolved, that for the purpose of carrying out the plan of corporate reorganization adopted, authorized, and directed by the stockholders at their said meeting this day by the passing and adoption of the said resolution by them at their said meeting, the

written option, dated July 2, 1928, and made by the president and secretary of the company, in behalf of the Minnesota Tea Company, to O. B. Westphal, signed by said officers and said O. B. Westphal, and the written agreement, dated July 24th, 1928, and made by said officers of the company and said O. B. Westphal, modifying the said option, be and hereby are ratified, confirmed, and approved, and the actions of the President and Secretary in giving and executing said option and agreement modifying the same are in all things ratified, confirmed, and approved, and that the assets of Minnesota Tea Company, described in said option, being all, or substantially all, the assets of Minnesota Tea Company, be sold and delivered to said O. B. Westphal, or his nominee, in pursuance of and under said option and agreement modifying the same and on the terms therein stipulated and thereby agreed and for the considerations therein and thereby stipulated, or upon such other terms as may be deemed advisable by the President, and that any other assets, if any there be, owned by, or in the disposition of Minnesota Tea Company be sold or assigned by this company to the purchaser of the assets specified in said option, if possible, upon such terms as may be obtained.

"Resolved, Further, that such sale and transfer of all the assets of Minnesota Tea Company upon the terms and for the consideration stipulated in said option and agreement modifying the same, or upon such other terms as the President may deem advisable, be made and effected, and that the President, or Vice-President, and the Secretary, in order to effect such sale of said assets of this company and to carry out the terms of said option as modified and of the terms of any agreement, hereby authorized, relative thereto, be and hereby are authorized and directed to execute in behalf of Minnesota Tea Company any bill of sale, assignments, agreements, and other instruments required to effect such sale and transfer and also for such purpose to cause Peterson Investment Company to execute the lease specified in said option to The Grand Union Company on terms satisfactory to The Grand Union Company.

"Resolved, Further, that for the purpose of carrying out said plan adopted by the stockholders at said meeting of the stockholders, all money received by Minnesota Tea Company on the sale of its said assets and in consideration thereof, whenever received, shall be immediately distributed to the stockholders of Minnesota Tea Company ratably and in proportion to their respective stockholdings in Minnesota Tea Company upon the assumption by the stcokholders of all the corporate debts of Minnesota Tea Company in order to enable the company to hold all the corporate stock and securities received by it for its assets on such sale thereof without being compelled to sell any part of such stock and securities for the payment of existing debts, and that a contract or agreement in writing shall be entered into by this company with its stockholders and signed by and in behalf of this company and its stockholders, whereby all the said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold the said corporate

stock and securities received on said sale of its assets without being compelled to sell any part thereof for the payment of its existing debts, shall agree to pay all the corporate debts of Minnesota Tea Company whether due and payable or not and whether certain or contingent, and further that the President be and hereby is authorized and directed to sign and execute such written agreement in behalf of Minnesota Tea Company with the stockholders of the company.

"Resolved, Further, that for the purpose of carrying out said plan adopted by the stockholders, Minnesota Tea Company continue to own and hold the said corporate stock and securities received by it on the sale of its assets without the sale or distribution thereof."

No further business came before the meeting, and on motion, duly seconded and carried, the Board then adjourned to meet on call of the President.

(Signed) A. F. PETERSON,
Secretary.

Attest:

(Signed) E. C. PETERSON,
President.

41 We, being all the Directors, hereby certify that the foregoing minutes are true and correct.

(Signed) E. C. PETERSON,
L. T. PETERSON,
A. F. PETERSON,
Directors.

EXHIBIT "D"

Agreement Supplemental to Option Dated July 2, 1928, for the Purchase of Minnesota Tea Company Property, Exercised July 6, 1928.

This Agreement, Made this 24th day of July 1928, by and between Minnesota Tea Company, a Minnesota corporation, hereinafter called the Seller, and O. B. Westphal, Esq., of Chicago, Illinois, hereinafter called the Buyer,

Witnesseth:

Whereas, by an instrument in writing dated July 2, 1928, the Seller heretofore granted an option to the Buyer for the purchase of certain assets of the Seller, for the consideration therein set forth, and the Buyer thereafter, on July 6, 1928, exercised said option; and

Whereas, it is desired to have the calculations required by paragraphs Fifth and Sixth of said exercised option made as of August 4, 1928, rather than as of the delivery date referred to in said exercised option, it being the desire of the parties to avoid any further expense of accounting between said August 4, 1928, and the delivery date herein agreed upon;

Now, Therefore, It Is Agreed by and between the parties hereto (any act done hereunder or any promise made herein by one of the parties to be taken as full and complete consideration for each and every promise made herein by the other party) as follows:

1. The delivery date referred to in said option is hereby extended to and including August 25, 1928.

2. It is agreed, however, that the calculations required by the Fifth and Sixth paragraphs of said option shall be made as of the end of August 4, 1928.

3. Between said August 4, 1928, and the said delivery date of August 25, 1928, as herein agreed, the Seller shall remain in
42 possession and management of its business, directing the same from its principal office at Duluth, Minnesota. All receipts during said period shall be deposited in a bank account to be opened in the name of "Minnesota Tea Company Special Account."

All expenses during said period shall be paid by checks drawn upon sad account. At the close of said period any balance remaining in said special account shall be turned over to the Buyer or his nominee, and any deficit which may exist at that time in said account shall be absorbed by the Buyer, it being the intention hereof to cause the operation of said Minnesota Tea Company to be for the account of the Buyer during said period from the end of August 4, 1928, to and including the delivery date of August 25, 1928, in the event the sale of assets contemplated by said exercised option is consummated, and to cause the operation of said Minnesota Tea Company to be for the account of the Seller during said period from the end of August 4, 1928, to the delivery date in the event the sale of assets contemplated by said exercised option is not consummated.

4. It is further agreed that the assets covered by said exercised option shall include, instead of exclude, all bills, notes, and accounts receivable which the parties to said [illegible] and hereto shall consider doubtful, but that in arriving at [illegible] price to be paid for the property covered by said option as thus modified, the books of the Minnesota Tea Company shall govern and the bills, notes, and accounts receivable which the parties hereto shall consider doubtful shall be deducted from the face value of corresponding items carried on such books at August 4, 1928, and in figuring the value of the assets as of December 31, 1927, the same percentage for doubtful items shall be deducted from the face value of corresponding items carried on such books at December 31, 1927, in order to determine whether the total purchase price shall be reduced or increased as provided in paragraphs Fifth and Sixth of said option.

5. It is further agreed that the Buyer does now, in good faith, make full inquiry of the Seller as to the names and places of residence and business of the Seller's creditors and the amount owing to each, and requests that a list thereof be furnished to him or his nominee on or before the 18th day of August 1928.

6. It is hereby agreed that the purchase contemplated by said
43 exercised option, as herein modified, will be exercised for and on behalf of the Buyer by his nominee, The Grand Union Company.

7. The five days' notice in writing of delivery date provided for in said option is hereby waived, August 25, 1928, having been herein agreed upon as such delivery date.

The said option of July 2, 1928, given by the Seller to the Buyer and so exercised is in full force and effect except as herein modified.

MINNESOTA TEA COMPANY,
By E. C. PETERSON, *President*, and
A. F. PETERSON, *Secretary*.
O. B. WESTPHAL [SEAL]

EXHIBIT "E"

A duly called meeting of the Stockholders of Minnesota Tea Company was held at its office and principal place of business at Duluth, Minnesota, on the 23rd day of August 1928, at 10 o'clock in the forenoon.

E. C. Peterson, L. T. Peterson, and A. F. Peterson, constituting all the Stockholders of said Company, were present at the meeting. E. C. Peterson, the President of the Company, presided at the meeting, and A. F. Peterson, the secretary of the Company, acted as Secretary thereof.

Upon motion duly made and seconded and unanimously carried, the following resolution was adopted:

Resolved, that the written option, dated July 2, 1928, given by this Company, signed by its President and Secretary, to O. B. Westphal, and the modification agreement made by this Company and signed in its name by its President and Secretary and by said O. B. Westphal, dated July 24th, 1928, be, and are, in all respects ratified, confirmed, and approved, and the actions of the officers of the Company in executing and delivering said option and modification are ratified, confirmed, and approved.

Resolved further, that the President or Vice President and Secretary of this company be, and they are hereby, authorized and directed to execute and deliver to The Grand Union Company, a Delaware corporation, bill of sale and instrument transferring the property covered by said option as modified and covering the agreements therein provided for, and they are hereby authorized and di-
44 rected to execute and deliver the bill of sale, conveyance, and agreement with The Grand Union Company now presented to this meeting, and that in closing said matter they are authorized to make any changes in form or substance of said instruments that they may deem advisable in carrying out the general plan and purpose of said option to said O. B. Westphal as so modified, which has been assumed by said The Grand Union Company, and they are

authorized and directed to execute and deliver any other instruments in general carrying out the purpose and intent of said option to said O. B. Westphal as so modified, and their action taken in this regard is approved and confirmed.

There being no further business to come before the meeting, the meeting adjourned.

(Signed) E. C. PETERSON,
President.

Attest:

(Signed) A. F. PETERSON,
Secretary.

Before United States Board of Tax Appeals

MINNESOTA TEA COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

A. F. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 54227, 60837–60839. Promulgated June 30, 1933

1. The acquisition by one corporation of substantially all the properties of another corporation is not of itself a statutory reorganization under section 112 (i) (1), Revenue Act of 1928. Such acquisition, to come within section 112 (i) (1) (A), must be part of a strict merger or consolidation or of something which partakes
45 of or resembles a merger or consolidation and involves a continuance of essentially the same interests through modified corporate form.

2. In determining whether a statutory reorganization exists, the definition of section 112 (i) (1) must be read in its entirety and part A may not be applied so as to stultify part B.

3. Three persons owning all the shares of a corporation conducting a local business cause the corporation's assets to be transferred to

another existing corporation with nation-wide activities, for cash, which is immediately distributed, and 7½ per cent of the shares of the larger corporation. The local corporation continues its existence, holding as its assets the acquired shares, and the individuals continue as its shareholders. Held, not a statutory reorganization, the local corporation being taxable upon a gain measured by the difference between the cost of the assets transferred and the sum of the cash and value of shares received, and the individuals being taxable upon the cash dividend received.

C. J. McGuire, Esq., for the petitioners.

Prew Savoy, Esq., and George D. Brabson, Esq., for the respondent.

Opinion

STERNHAGEN: The respondent determined deficiencies in the income taxes of the petitioners as follows: Minnesota Tea Co., $11,587.64 for the period January 1, 1928, to August 24, 1928; E. C. Peterson, $15,982.31 for 1928; A. F. Peterson, $646.66 for 1928; and L. T. Peterson, $15,974.76 for 1928. There is no explanation for the use of a short tax period for the Minnesota Tea Co., although it is stated in the notice of deficiency of January 26, 1931, that "it is still a going concern." The facts are stipulated, and findings are unnecessary.

The Minnesota Tea Co., engaged in the retail grocery business, negotiated in 1928 for the transfer of its business to the Grand Union Co. Its shares were all owned by the three Petersons, and, so far as appears, still are. Before making the transfer to the Grand Union Co., it transferred its real estate and some miscellaneous property to the Peterson Investment Co., newly created for the purpose, in exchange for the Peterson Co.'s shares, which it immediately distributed proportionately among its three shareholders. Thus reduced, the entire assets of the Minnesota Co., 46 the statutory cost of which was $254,646.62, were transferred to the Grand Union Co. for $426,842.52 cash and 18,000 shares (voting trust certificates) of Grand Union no-par common, which it agreed not to sell for a year. The 18,000 shares were neither distributed nor sold. The $426,842.52 was distributed among the three shareholders, who assumed, and paid, the Minnesota Co.'s liabilities amounting to $106,471.73. At the time of the receipt by the Minnesota Co. of the cash and shares, its undistributed earnings and profits were $109,442.83. The outstanding shares of the Grand Union Co. were at this time 239,726, and they were being sold on the New York Stock Exchange for around 30.

Several questions are raised as to the gain resulting to each of the petitioners from these transactions and as to the recognition thereof as a statutory matter; but such questions are predicated upon the idea that there was a stautory reorganization, as that term is

defined by section 112 (i) (1),[1] Revenue Act of 1928. Whether there was such a reorganization must, therefore, be first decided. If there was no such reorganization, there is no foundation for the petitioners' attack on the deficiencies, and the respondent's determinations must be sustained; while if a statutory reorganization occurred, the measure of the resulting tax must be determined with regard to other statutory provisions.

At the time when the deficiencies were determined, there was a disposition to read the statutory definition with a superficial regard for its language, and thus to esay that the acquisition by one corporation of substantially all the properties of another corporation was per se a reorganization. The extent of this literalism is indicated by Sarther Grocery Co. vs. Commissioner, 63 Fed. (2d) 68, in which the view was urged by the taxpayer that a sale for cash of all
46 its properties by one corporation to another was a reorganization. See Tulsa Oxygen Co., 18 B. T. A. 1283; National Pipe & Foundry Co., 19 B. T. A. 242; First Nat. Bank of Champlain, 21 B. T. A. 415; Robert D. Green, 24 B. T. A. 719. In Cortland Specialty Co., 22 B. T. A. 808, the Board gave a broader consideration to the definition and, although there was "no question whatsoever but that substantially all of the [one] company's properties were acquired by the [other]", held that there was no reorganization.

In the development of the law by the courts, the literal view has never gained a foothold. The Fifth Circuit Court of Appeals, in Pinellas Ice & Cold Storage Co. vs. Commissioner, 57 Fed. (2d) 188, the first court decision on the subject, took quite the opposite view, saying:

"It must be assumed that in adopting paragraph (h) (of section 203, Revenue Act of 1926, to which the section now under consideration is similar) Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point."

A few months later the Second Circuit Court of Appeals, in Cortland Specialty Co. vs. Commissioner, 60 Fed. (2d) 937, held that the acquisition by one corporation of all the properties of another was not to be treated by itself as a statutory reorganization; that such

[1] Sec. 112. Recognition of Gain or Loss.

(i) Definition of reorganization.—As used in this section and sections 113 and 115—
(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

acquisition, to be within the statute, must be related to what would in general legal parlance be referred to as a reorganization, but that the concept of such reorganization was not as restricted as the Fifth Circuit Court of Appeals had held, as being confined to technical mergers or consolidations, but could include other arrangements whereby there was substantially a continuance of the same interests in the business and properties affected, the change being only a modification in corporate form or structure.

The Supreme Court, in Pinellas Ice & Cold Storage Co. vs. Commissioner, 287 U. S. 462, held that the absolute view of the Fifth Circuit Court of Appeals was too narrow an interpretation of the statute. The Supreme Court cited with approval the opinion of the Second Circuit Court of Appeals in Cortland Specialty Co. vs. Com-
48 missioner, supra. It said that the parenthetical expression, "the acquisition of substantially all the properties of another corporation", has the effect of "expand[ing] the meaning of 'merger or consolidation' so as to include some things which partake of the nature of a merger or consolidation, but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation." It held that the situation before it "has no real semblance to a merger or consolidation."

In the light of these decisions it is now the law that the parenthetical expressions may not be considered separately, but only as parts of the entire section of the statute, and hence that the acquisition by one corporation of substantially all of another's properties is not, of itself, enough to constitute a statutory reorganization but must be part of a strict merger or consolidation or of something which partakes of the nature of a merger or consolidation and has a real semblance to a merger or consolidation and involves a continuance of essentially the same interests through a modified corporate structure.

This construction of part (A) of the definition must be shaped to fit into the definition as a whole. There is a plain intendment to correlate part (A) or part (B), for both deal with the change of ownership among corporations of their properties. Whether there be any substantial significance in the fact that (A) treats of the acquisition, thus apparently emphasizing the receiving side of the transaction, while (B) treats of the transfer, the opposite facet, is perhaps unimportant here; for, however that may be, they must both be construed to effect.[2] (A) may not be read so broadly in respect of the acquisition of property for stock as to stultify (B), dealing with the transfer of property for stock. Such a transfer, to be a reorganization under (B), must comply with the prescribed condition—"If immediately after the transfer the transferor or its stockholders, or both, are in control of the corporation to which the assets are trans-

[2] An examination of the history of these provisions seems to indicate that there was no deliberate design to differentiate between the phraseology of (A) and (B), but only to bring together, within the definition of reorganization, language which had already been used in separate parts of the statutory scheme.

ferred", and it would not do to treat as a reorganization a transfer for less than control through the device of calling it a merger and thus bringing it within (A). While, therefore, there is latitude in the term "merger", there is at the same time the necessity of keeping it within the bounds of (A) and not invading (B).

There is substantial difficulty in this. Some overlapping seems inevitable. It is therefore better not to attempt to formulate a rule of construction, which by its very language may serve to constrict the operation of the statute more narrowly than was intended. It is only important to fulfill the purpose indicated by the language of the statute. The underlying purpose of this section is to permit a change in the form of ownership which in essence does not affect continuance of the same actual ownership of substantially the same properties without fear of tax at the time of the formal change. In the case of a true merger or consolidation, the immunity from tax is extended beyond this purpose, since to the shareholder the result is to give him new shares representing properties in some of which he therefore had no interest. While through modified forms he has a continuing interest in the same assets, although in a lessened proportion, he also acquires an interest in entirely new assets.

Is this, then, an arrangement which for the purpose of the statute so far partakes of the nature of a merger or consolidation or resembles it as to bring about the same tax result, notwithstanding it is not the transfer of properties for controlling shares of the transferee? Three persons owning all the shares of a corporation conducting a local business cause the corporation's assets to be transferred to another existing corporation with Nation-wide activities, for cash, $426,842.52, which is distributed to them, and approximately 7½ percent of the shares of the large corporation, worth approximately $540,000. The local corporation continues its existence, holding as its assets the acquired shares, and the individuals continue to be the owners of their original shares. We think it is not within the scope of the statute.

The nature of the transaction is the same as that treated in (B), except for the condition. Omitting consideration of the cash received, since its effect is found rather in subdivision (d) than in the definition of subdivision (i), there was a transfer by one corporation of all its properties to another for stock in the transferee, but instead of being in control, which by subdivision (j) means the ownership of at least 80 percent of the transferee's shares, there is ownership by the transferor of only 7½ percent of such shares. Thus the transaction appears to be far from a continuing interest in the same property through a mere change in forms of ownership but rather an almost complete change in the essential assets owned; and this still disregards the large proportion of cash received.

This wide departure from the percentage of stock upon which (B) is conditioned, in a transaction which is otherwise within that part of the definition, should make us slow to find (A) nevertheless applicable.

The parties to the transaction deliberately for their own purposes refrained from a merger. Furthermore, they chose an arrangement which avoided the result of a merger. Instead of the shareholders of the Minnesota Co. owning shares of the Grand Union Co., as they would have if there had been a merger, they continued to own Minnesota shares; and instead of the Minnesota Co.'s disappearance as in a merger, its existence and powers continued, and as the owner of the Grand Union shares it brought about a freedom from immediate tax upon the dividends upon such Grand Union shares, since by section 23 (p) such dividends are deductible by a corporation simultaneously with their receipt as gross income, while to an individual shareholder dividends are subject to surtax.

This decision does not restrict (A) to technical mergers. It still leaves room for a more expansive application of the statute. It might be suggested, for example, that by having the assets of the Minnesota Co. transferred to the Grand Union in exchange for shares and then having the Minnesota Co. promptly distribute such shares among its own shareholders in liquidation and dissolve, so that in all substantial respects the outcome would have been the same as if a true merger had occurred, the petitioners might properly have invoked part (A) of the definition. How much further from a true merger they might have gone and yet achieved what the statute calls a reorganization we do not attempt to say. It is enough now to hold that the facts before us go further than the statute implies, and that there was no reorganization.

In this view, the Minnesota Co. realized a gain measured by the difference between the $254,646.62, cost of its property, and $966,842.52, being the sum of $426,842.52 cash and $540,000, the value of the 18,000 shares of Grand Union Co. Section 111. This gain of $712,195.90 may not escape recognition. Section 112 (a).

The question is suggested whether the 18,000 shares of Grand
51 Union stock were without fair market value, since there was a covenant against its sale within a year after its receipt. The petitioners say they do not press the point before the Board, but "preserve it for the purpose of the record." The restriction was a contractual obligation and therefore voluntary, and does not, in our opinion, leave the shares without fair market value, as that term is meant to be used in the statute. See Newman vs. Commissioner, 40 Fed. (2d) 225. This fair market value we find to be $30 a share.

As to the Petersons, it follows from the foregoing that the distribution to them, as shareholders, of the cash surplus was, after being reduced by the amount of the liabilities assumed, $106,471.73, an ordinary dividend subject to surtax.

Reviewed by the Board.

Judgment will be entered under Rule 50.

MARQUETTE concurs in the result.

Dissenting opinion

VAN FOSSAN, dissenting: It seems clear to me that the prevailing opinion goes much further than is warranted either by the language of the revenue acts or by the authoritative decisions of the courts. It reads into the statute a concept and a limitation neither written in nor intended by Congress.

Dissenting opinion

BLACK, dissenting: The effect of the majority opinion as I construe it is to interpret paragraph (1) (A) of section 112 (i) of the Revenue Act of 1928, which now reads: "(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)" as if the last clause quoted above were made to read: "or substantially all the properties of another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the properties are transferred." I find no warrant for reading into the statute this language which is not there.

In support of the conclusion which it reaches, the majority opinion cites Cortland Specialty Co., 22 B. T. A. 808; affd., 60 Fed. (2d) 937, and Pinellas Ice & Cold Storage Co. vs. Commissioner, 287 U. S. 462. I do not think these two cases are authority for what the Board holds in the instant case.

52 In the Cortland Specialty Co. case, one corporation transferred its assets to another in consideration of cash and promissory notes. The Board held that the transaction was not a reorganization, but simply a sale by one corporation of its assets to another. This view was upheld by the Circuit Court of Appeals for the Second Circuit, the court holding that the transaction did not come within section 203 (e), Revenue Act of 1926, because the property received for the assets sold did not include "stock or securities", the notes received not being so classifiable. There was no continuity of interest on the part of the transferor corporation or its stockholders in the property sold because neither the selling corporation nor its stockholders received stock in the purchasing corporation. The situation in Pinellas Ice & Cold Storage Co. was pretty much the same. There two corporations owned by the same stockholders sold their assets to a third corporation for cash and promissory notes. No stock or other securities of the purchasing corporation were received. The Supreme Court held that the transaction was a mere sale of assets and did not partake of any of the features of either a merger or a consolidation. The court was, however, careful to point out that the words within the parenthesis of (A) might not be disregarded. On that point the court said:

"* * * the words within the parenthesis may not be disregarded. They expand the meaning of "merger" or "consolidation" so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short term purchase money notes."

In the instant case the seller acquired an interest in the affairs of the purchasing company to the extent of 18,000 shares (voting trust certificates) of its no-par common stock. This, in my opinion, gave the transferring corporation that continuing interest in the new enterprise which brings the transaction within the definition of (A) above quoted. As to the cash received in the transaction,
53 it is taxable to the corporation to the extent of the gain realized, unless distributed to the stockholders in pursuance of the plan of reorganization. This is so by reason of section 112 (d) of the Revenue Act of 1928, which reads:

"If an exchange would be within the provisions of subsection (b) (4) of this section; if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed."

It is my understanding that it is under the foregoing provision that the Commissioner has determined that there is a taxable gain to the corporation in this proceeding to the extent of $106,471.73. On the date that petitioner, the Minnesota Tea Co., transferred all of its assets to the Grand Union Co. for 18,000 shares of its common stock plus $426,842.52 in cash, pursuant to resolutions authorizing the transfer, it immediately distributed the cash pro rata to its shareholders, the petitioners, E. C., A. F., and L. T. Peterson, who assumed and thereafter duly discharged all of its liabilities. The petitioners Peterson received cash in the amount of $426,842.52 and assumed and paid liabilities of $106,471.73, each thereby receiving his pro rata portion of the net distribution of $320,370.79. Respondent has held this taxable to each of the petitioners Peterson as

dividends received from the corporation, and has held the $106,471.73 taxable to the corporation as profit from the transfer of assets, received in cash and not distributed to the stockholders in pursuance to a plan of reorganization. The Commissioner contends that this $106,471.73 was impressed with a trust, that the stockholders should use it to pay the debts of the corporation and that this is not a distribution to stockholders within the meaning of the statute above quoted, but is equivalent to the corporation itself using
54 the money to pay its debts. With this view I agree. The majority opinion, however, does not affirm the deficiency against the corporation on that ground, but on the ground that there was no reorganization and the whole transaction was taxable. With this view, for reasons I have already stated, I disagree. I do not discuss the question as to whether the $320,370.79 admittedly distributed to the petitioners Peterson is all taxable to them as dividends as determined by respondent, or only a part as contended by petitioners. The majority opinion having affirmed the deficiencies on the ground that there was no reorganization, I am content to record my dissent to that holding.

Before United States Board of Tax Appeals, Washington

Docket No. 60837

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of redetermination, December 18, 1933

Subsequent to the Board's report, promulgated June 30, 1933, 28 B. T. A. 591, the respondent filed a proposed judgment which the petitioner agrees is in conformity with the said report. In accordance therewith, it is

Ordered, adjudged, and decided that there is a deficiency of $15,982.31 in income tax for 1928.

[SEAL] (Signed) JOHN M. STERNHAGEN,
Member.

U. S. Board of Tax Appeals, 1924.
Enter
Entered Dec. 18, 1933.

Before United States Board of Tax Appeals, Washington

Docket No. 60839

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of redetermination, December 18, 1933

Subsequent to the Board's report, promulgated June 30, 1933,
55 28 B. T. A. 591, the respondent filed a proposed judgment which the petitioner agrees is in conformity with the said report. In accordance therewith, it is

Ordered, adjudged and decided that there is a deficiency of $15,974.76 in income tax for 1928.

[SEAL] (Signed) JOHN M. STERNHAGEN,
Member.

Enter

Entered Dec. 18, 1933.

In United States Circuit Court of Appeals For the Eighth Circuit

[Title omitted.]

Petition of E. C. Peterson for review of decision of United States Board of Tax Appeals in case no. 60837

Filed February 5, 1934

To the Honorable Circuit Court of Appeals for the Eighth Circuit:

The petition of E. C. Peterson, a resident and inhabitant of the City of Duluth, St. Louis County, Minnesota, respectfully shows:

One. This is a proceeding for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the United States Board of Tax Appeals entered December 18, 1933, redetermining a deficiency in income taxes for the calendar year 1928 in amount $15,982.31, petitioner having filed his income tax return for said year with the Collector of Internal Revenue, St. Paul, Minnesota.

Two. The nature of the controversy before said Board of Tax Appeals was the redetermination of the deficiency in income taxes for the calendar year 1928 and, in particular, whether the petitioner was subject to a tax as a result of the transactions hereinafter set forth. The controversy comes up for review as follows:

(1) Minnesota Tea Company is a Minnesota corporation, the entire stock in which, in 1928 and for several years prior thereto, was owned by petitioner and two others, in the following amounts:

56

E. C. Peterson	702 shares
A. F. Peterson	113 shares
L. T. Peterson	702 shares

(2) On August 23, 1928, the Minnesota Tea Company transferred all of its assets to Grand Union Company, another corporation, receiving therefor 18,000 shares of the common capital stock of Grand Union Company and $426,842.52 in cash. The exchange was accomplished through the exercise of an option granted to O. B. Westfall as agent for Grand Union Company, which option was exercised on July 6, 1928. Thereafter, Minnesota Tea Company, by appropriate resolution of the stockholders, authorized and directed the immediate distribution to the stockholders, in the proportion of their respective stock holdings, of the cash so received from Grand Union Company. This resolution further provided for the execution on the part of the company and its stockholders of a written agreement whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold said corporate stock (in Grand Union Company) without being compelled to sell any part thereof for the payment of existing debts, agreed to pay all the corporate debts of Minnesota Tea Company, whether due and payable or not and whether certain or contingent.

(3) The entire sum of $426,842.52 was immediately distributed and the amounts received and the liabilities assumed by the stockholders under this resolution were respectively as follows:

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,830.66	7,930.99	23,899.67
L. T. Peterson	197,505.93	49,270.37	148,235.56
	$426,842.52	$106,471.73	$320,370.79

(4) The respective bases of the Minnesota Tea Company stock owned by the petitioner and the other stockholders for the purpose of determining gain or loss from the sale or disposition thereof was:

E. C. Peterson	$59,376.78
A. F. Peterson	$ 9,573.17
L. T. Peterson	$59,376.78

On the date of the transfer the undistributed profits and earnings of Minnesota Tea Company amounted to $109,442.-
57 73. The respondent, in his final determination of the 1928 tax liability of this petitioner, held that the entire distribution to petitioner of $148,235.56 and the total net amount received by all the stockholders ($320,370.79) was out of earnings and profits of Minnesota Tea Company and added to the earnings and profits ex-

isting at the time of the transfer, namely, $109,442.83, the amount of profit which would have been realized if gain on the exchange was recognized.

(5) The 18,000 shares of Grand Union Company stock were received subject to an agreement on the part of the Minnesota Tea Company not to dispose of any of said stock for a period of one year from the delivery date, other than to stockholders of Minnesota Tea Company, and that if it should dispose of any of the same to said stockholders, it would cause them, at the time of acquisition, to enter into an agreement with the Grand Union Company agreeing that for such period they would not sell or otherwise dispose of any of the same to be acquired by them. Minnesota Tea Company did not dispose of the 18,000 shares but, on the contrary, held them.

(6) The matter came on for hearing before the Board of Tax Appeals at Washington, D. C., upon the petition of the petitioner requesting a redetermination of the determination of the Commissioner of Internal Revenue. The answer of the Commissioner, as respondent, was duly filed, and the case was at issue on the question of whether respondent's action in increasing earnings and profits as hereinbefore indicated, was proper.

(7) The facts in the case were presented by stipulation. The case was presented to the Board of Tax Appeals, upon the assumption by both the petitioner and the respondent that the state of facts stipulated indicated a statutory reorganization under Sec. 112 (i) (1) of the Revenue Act of 1928. Prior to the issuance of its decision, the Board indicated that it was in doubt as to whether the assumption of both parties, that there had been a reorganization, was correct; and the petitioner's counsel was advised thereof and thereafter filed a memorandum upon that question. Thereafter and on the 30th day of June 1933, the Board of Tax Appeals promulgated its opinion (two members dissenting), wherein it was determined that there was no reorganization, and holding that the petitioner was taxable in the amount of $15,982.31.

(8) Thereafter and on the 18th day of December 1933 judgment was entered against petitioner in said amount.

58 (9) The petitioner, being aggrieved by said findings of the Board, opinion, decision, and orders, files this petition for a review thereof.

Assignments of Error

Three. The errors committed by said Board of Tax Appeals upon which the petitioner relies as a basis of this proceeding are as follows:

(1) The Board erred in holding that the petitioner was taxable upon any sum in excess of $50,645.27.

(2) The Board erred in holding that any amount in excess of $109,442.73 of the money distributed to the stockholders of Minnesota Tea Company was a distribution from earnings and profits.

(3) The Board erred in holding that the transactions above set forth and appearing in the stipulated facts did not constitute a reorganization as defined in Sec. 112 (i) (1) of the Revenue Act of 1928.

(4) The Board erred in holding that petitioner had failed to establish that there was no taxable income to petitioner in excess of $50,645.27, as a result of the transactions set forth in the stipulated statement of facts.

(5) The Board erred in rendering the decision for the respondent.

Wherefore your petitioner prays that this Honorable Court may review the action of the Board of Tax Appeals in this cause, reverse the decision of the Board, and direct the entry of the decision by said Board in favor of the petitioner, determining that there is no deficiency in income tax for the year 1928 due from the petitioner; and for such other and further relief as may to this Court appear proper in the premises.

E. C. PETERSON,
Petitioner.

OSCAR MITCHELL,
1200 Alworth Building, Duluth, Minnesota,
Counsel for Petitioner.

[*Duly sworn to by E. C. Peterson; jurat omitted in printing.*]

59 In United States Circuit Court of Appeals for the Eighth Circuit

(Title omitted.)

Petition of L. T. Peterson for review of decision of United States Board of Tax Appeals in case no. 60839

Filed February 5, 1934

To the Honorable Circuit Court of Appeals for the Eighth Circuit:

The petition of L. T. Peterson, a resident and inhabitant of the City of Duluth, St. Louis County, Minnesota, respectfully shows:

One. This is a proceeding for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the United States Board of Tax Appeals entered December 18, 1933, redetermining a deficiency in income taxes for the calendar year 1928 in amount $15,974.76, petitioner having filed his income-tax return for said year with the Collector of Internal Revenue, St. Paul, Minnesota.

Two. The nature of the controversy before said Board of Tax Appeals was the redetermination of the deficiency in income taxes for the calendar year 1928 and, in particular, whether the petitioner was subject to tax, as a result of the transactions hereinafter set forth. The controversy comes up for review as follows:

(1) Minnesota Tea Company is a Minnesota corporation, the entire stock in which, in 1928 and for several years prior
60 thereto, was owned by petitioner and two others, in the following amounts:

E. C. Peterson	702 shares
A. F. Peterson	138 shares
L. T. Peterson	702 shares

(2) On August 23, 1928, the Minnesota Tea Company transferred all of its assets to Grand Union Company, another corporation, receiving therefor 18,000 shares of the common capital stock of Grand Union Company and $426,842.52 in cash. The exchange was accomplished through the exercise of an option granted to one O. B. Westfall as agent for Grand Union Company, which option was exercised on July 6, 1928. Thereafter, Minnesota Tea Company, by appropriate resolution of the stockholders, authorized and directed the immediate distribution to the stockholders, in the proportion of their respective stockholdings, of the cash so received from Grand Union Company. This resolution further provided for the execution on the part of the company and its stockholders of a written agreement whereby said stockholders, in consideration of such distribution and for the purpose of enabling the company to continue to hold said corporate stock (in Grand Union Company) without being compelled to sell any part thereof for the payment of existing debts, agreed to pay all the corporate debts of Minnesota Tea Company, whether due and payable or not and whether certain or contingent.

(3) The entire sum of $426,842.52 was immediately distributed and the amounts received and the liabilities assumed by the stockholders under ths iresolution were respectively as follows:

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,930.66	7,930.99	23,999.67
L. T. Peterson	197,505.93	49,270.37	148,235.56
	426,842.52	106,471.73	320,370.79

(4) The respective bases of the Minnesota Tea Company stock owned by the petitioner and the other stockholders for the purpose of determining gain or loss from the sale or disposition thereof was:

E. C. Peterson	$59,376.78
A. F. Peterson	9,573.17
L. T. Peterson	59,376.78

61 On the date of the transfer the undistributed profits and earnings of Minnesota Tea Company amounted to $109,442.72. The respondent, in his final determination of the 1928 tax liability of this petitioner, held that the entire distribution to petitioner of $148,235.56 and the total net amount received by all the stockholders ($320,370.79) was out of earnings and profits of Minnesota Tea Company and added to the earnings and profits existing at the time of

the transfer, namely, $109,442.83, the amount of profit which would have been realized if gain on the exchange was recognized.

(5) The 18,000 shares of Grand Union Company stock were received subject to an agreement on the part of the Minnesota Tea Company not to dispose of any of said stock for a period of one year from the delivery date, other than to stockholders of Minnesota Tea Company, and that if it should dispose of any of the same to said stockholders it would cause them, at the time of acquisition, to enter into an agreement with the Grand Union Company agreeing that for such period they would not sell or otherwise dispose of any of the same to be acquired by them. Minnesota Tea Company did not dispose of the 18,000 shares, but, on the contrary, held them.

(6) The matter came on for hearing before the Board of Tax Appeals at Washington, D. C., upon the petition of the petitioner requesting a redetermination of the determination of the Commissioner of Internal Revenue. The answer of the Commissioner, as respondent, was duly filed and the case was at issue on the question of whether respondent's action in increasing earnings and profits, as hereinbefore indicated, was proper.

(7) The facts in the case were presented by stipulation. The case was presented to the Board of Tax Appeals, upon the assumption by both the petitioner and the respondent that the state of facts stipulated indicated a statutory reorganization under Sec. 112 (i) (1) of the Revenue Act of 1928. Prior to the issuance of its decision the Board indicated that it was in doubt as to whether the assumption of both parties, that there had been a reorganization, was correct; and the petitioner's counsel was advised thereof and thereafter filed a memorandum upon that question. Thereafter and on the 30th day of June 1933 the Board of Tax Appeals promulgated its opinion
(two members dissenting), wherein it was determined that
62 there was no reorganization, and holding that the petitioner was taxable in the amount of $15,974.76.

(8) Thereafter and on the 18th day of December 1933 judgment was entered against petitioner in said amount.

(9) The petitioner, being aggrieved by said findings of the Board, opinion, decision, and orders, files this petition for a review thereof.

Assignments of Error

Three. The errors committed by said Board of Tax Appeals upon which the petitioner relies as a basis of this proceeding, are as follows:

(1) The Board erred in holding that the petition was taxable upon any sum in excess of $50,645.27.

(2) The Board erred in holding that any amount in excess of $109,442.73 of the money distributed to the stockholders of Minnesota Tea Company was a distribution from earnings and profits.

(3) The Board erred in holding that the transactions above set forth and appearing in the stipulated facts did not constitute a re-

organization as defined in Sec. 112 (i) (1) of the Revenue Act of 1928.

(4) The Board erred in holding that petitioner had failed to establish that there was no taxable income to petitioner in excess of $50,645.27, as a result of the transactions set forth in the stipulated statement of facts.

(5) The Board erred in rendering the decision for the respondent.

Wherefore, your petitioner prays that this Honorable Court may review the action of the Board of Tax Appeals in this cause, reverse the decision of the Board, and direct the entry of the decision by said Board in favor of the petitioner, determining that there is no deficiency in income tax for the year 1928 due from the petitioner; and for such other and further relief as may to this Court appear proper in the premises.

L. T. PETERSON.

OSCAR MITCHELL,
1200 Alworth Building, Duluth, Minnesota,
Counsel for Petitioner.

63 [Duly sworn to by L. T. Peterson; jurat omitted in printing.]

Before United States Board of Tax Appeals

Docket Nos. 60837, 60838, and 60839

Stipulation for consolidation of appeals and as to dismissal of appeal of A. F. Peterson, case no. 60838

Filed May 17, 1934

[Title omitted.]

A petition for review having been filed in the above-entitled and numbered proceedings and a joint praecipe having been filed, it is hereby stipulated and agreed by counsel for the respective parties that the records in the cases of E. C. Peterson and L. T. Peterson may be consolidated and that it is not necessary that any record be prepared in the case of A. F. Peterson in view of the fact that such proceeding has been dismissed by the Circuit Court of Appeals for the Eighth Circuit on stipulation therein filed.

OSCAR MITCHELL,
Counsel for Petitioners,
1200 Alworth Building, Duluth, Minnesota.
(Sgd.) ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

64 Before United States Board of Tax Appeals

Docket Nos. 60837, 60838, and 60839

Praecipe for transcript

Filed March 10, 1934

[Title omitted.]

To: E. Barrett Prettyman, Esquire, General Counsel, Bureau of Internal Revenue, Washington, D. C.

Please take notice that the petitioners in the above-entitled proceeding designate the following portions of the Record in this cause to be incorporated into the transcript on their appeal:

1. Docket entries of the proceedings before the Board of Tax Appeals.
2. Pleadings before the Board of Tax Appeals.
3. Agreed statement of facts.
4. Opinion and decision of the Board of Tax Appeals.
5. Petition for review.
6. Agreed statement of facts.
7. Judgment.
8. This praecipe.

The foregoing transcript to be prepared conformably to law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

Please take further notice that on the day of 1934, at 9:30 o'clock a. m., I shall move that the above portions of the Record, as designated, be incorporated in the transcript on appeal heretofore taken to the United States Circuit Court of Appeals for the Eighth Circuit.

Respectfully.

(Sgd.) OSCAR MITCHELL,
Attorney for Petitioners,
1200 Alworth Building, Duluth, Minnesota.

Dated March 10, 1934.

Service acknowledged.

(Sgd.) ROBERT H. JACKSON,
Als.

65 [Clerk's certificate to foregoing transcript omitted in printing.]

66-68 [Appearances of counsel omitted in printing.]

69 In United States Circuit Court of Appeals, Eighth Circuit

Order of submission

Memorandum of clerk:

On the 27th day of November 1934 and the 28th day of November 1934, respectively, these causes, nos. 10032 and 10033, together with cause no. 10031, were submitted to the United States Circuit Court of Appeals for the Eighth Circuit, and a full copy of the order of argument and of the order of submission having been included in the transcript taken for the Supreme Court of the United States on an application for writ of certiorari in cause no. 10031, Minnesota Tea Company, petitioner, vs. Commissioner of Internal Revenue, respondent, the same are omitted from the transcript in these causes, nos. 10032 and 10033.

70 In United States Circuit Court of Appeals, Eighth Circuit

No. 10032. March term, A. D. 1935

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review of decision of United States Board of Tax Appeals

No. 10033. March term, A. D. 1935

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review of decision of United States Board of Tax Appeals

Mr. Homer Hendricks and Mr. James G. Nye (Mr. Oscar Mitchell and Messrs. Mitchell, Gillette, Nye, and Harries were with him on the brief), for petitioners; Mr. J. Louis Monarch, Special Assistant to the Attorney General (Mr. Frank J. Wideman, Assistant Attorney General, and Mr. Maurice J. Mahoney, Special Assistant to the Attorney General, were with him on the brief), for respondent.

71 Before SANBORN, WOODROUGH, and BOOTH, Circuit Judges

Opinion March 25, 1935

BOOTH, Circuit Judge, delivered the opinion of the court:

There are here two petitions for review of decisions of the United States Board of Tax Appeals.

The Board held that there was a deficiency in the income taxes for the calendar year 1928 of E. C. Peterson in the amount of $15,982.31; and of L. T. Peterson in the amount of $15,974.76.

There were also involved the income taxes of A. F. Peterson, but by stipulation that matter has been disposed of.

The petitions were submitted on an agreed statement of facts, and are companion cases—or at least very closely allied—to the petition no. 10031, Minnesota Tea Company v. Commissioner.

The following facts appear: the three Petersons owned the entire stock of the Minnesota Tea Company for several years prior to 1928. On August 23, 1928, the Minnesota Tea Company transferred all of its assets to the Grand Union Company, receiving 18,000 shares of common stock of the Grand Union Company and $426,842.52 in cash.

Upon the completion of the transaction the cash received from the Grand Union Company was immediately distributed by the Minnesota Tea Company to its stockholders, pursuant to a resolution of the stockholders passed at a special meeting, the stockholders assuming the debts of the corporation, amounting to $106,471.73.

The amounts received and the liabilities assumed by each of the stockholders of the Minnesota Tea Company were as follows:

Stockholders	Cash received	Liabilities assumed	Net receipts
E. C. Peterson	$197,505.93	$49,270.37	$148,235.56
A. F. Peterson	31,830.66	7,930.99	23,899.67
L. T. Peterson	197,505.93	49,270.37	148,235.56
	$426,842.52	$106,471.73	$320,370.79

The amount of undistributed earnings and profits of the Minnesota Tea Company immediately prior to the exchange was $109,442.83.

72 The Commissioner held that the entire net receipts of $320,370.79 were out of earnings and profits; and the deficiencies were computed on the basis of taxing the entire amount of $320,370.79 as a dividend.

Two contentions are involved in these petitions: the first is that the transaction whereby the Minnesota Tea Company exchanged its assets for stock of the Grand Union Company and cash was a reorganization.

This is the same question that was involved in no. 10,031, Minnesota Tea Company v. Commissioner, and has been decided in favor of the contention of petitioners (opinion filed as of the same date with this opinion).

The second contention involves the question: If the Minnesota Tea transaction is held to be a reorganization, petitioners conceding that a part of the distribution is taxable as a dividend, whether any part of the balance is taxable as a capital gain.

It appears from the record that the controversy was submitted to the Board of Tax Appeals on the assumption that there was a reorganization of the Minnesota Tea Company; but it further appears that the Board of Tax Appeals held that there was in fact no reorganization; and it further appears that the redetermination by the Board of Tax Appeals of the tax deficiencies of petitioners was on the basis of no reorganization of the Minnesota Tea Company, and that no redetermination of deficiency has been made by that Board on the basis that there was a reorganization; in other words, the question whether all of this net cash should be taxed as dividends if the Minnesota Tea transaction should be held to be a reorganization was neither considered nor decided by the Board.

Under the circumstances, and in view of the holding of this court in case no. 10,031 that there was a reorganization, it is deemed advisable by this court that these petitions for review be granted, that the orders of the Board of Tax Appeals redetermining deficiencies as to petitioners be reversed, and the causes remanded to the Board of Tax Appeals with instructions for further proceedings not inconsistent with the foregoing opinion.

73

It is so ordered.

WOODROUGH, Circuit Judge, dissents on the grounds indicated by dissenting opinion in no. 10,031, Minnesota Tea Company v. Commissioner of Internal Revenue.

74 In United States Circuit Court of Appeals, Eighth Circuit

No. 10,032

E. C. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

Decree, March 25, 1935

On petition to review decision of United States Board of Tax Appeals

This cause came on to be heard on the petition for review of a decision of the United States Board of Tax Appeals which redetermined a deficiency in the income tax of the petitioner for the calendar year 1928, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the said petition for review in this cause be, and it is hereby, granted, and that the order of the said Board of Tax Appeals be, and it is hereby, reversed, without the taxation of costs in favor of either of the parties in this court.

And it is further ordered by this court that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals with instructions for further proceedings not inconsistent with the opinion of this court.

March 25, 1935.

75 In United States Circuit Court of Appeals, Eighth Circuit

No. 10,033

L. T. PETERSON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

Decree, March 25, 1935

On petition to review decision of United States Board of Tax Appeals

This cause came on to be heard on the petition for review of a decision of the United States Board of Tax Appeals which redetermined a deficiency in the income tax of the petitioner for the calendar year 1928, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the said petition for review in this cause be, and it is hereby, granted, and that the order of the said Board of Tax Appeals be, and it is hereby, reversed, without the taxation of costs in favor of either of the parties in this court.

And it is further ordered by this court that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals with instructions for further proceedings not inconsistent with the opinion of this court.

March 25, 1935.

76 [Clerk's certificate to foregoing transcript omitted in printing.]

77 Supreme Court of the United States

No. 175, October term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following no. 174.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

78 Supreme Court of the United States

No. 176, October term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following nos. 174 and 175.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File nos. 39729, 39730. U. S. Circuit Court of Appeals, Eighth Circuit. Term no. 175. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. E. C. Peterson. Term no. 176. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. L. T. Peterson. Petition for writs of certiorari and exhibit thereto. Filed June 25, 1935. Term nos. 175 O. T. 1935, 176 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935